

**ORIGINAL**

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA  
SUPREME COURT NOS. 20030343  
20030344

RECEIVED BY CLERK  
SUPREME COURT JUN 9 2004

20030343

CITY OF MINOT  
PLAINTAIFF/APPELLEE

20030344

-VS-

TRENTON JACOB KARY  
DEFENDANT/APPELLANT

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

JUN 08 2004

APPELLANT'S REPLY

STATE OF NORTH DAKOTA

## TABLE OF AUTHORITIES

### Cases:

State v. Beaton, 516 N.W.2d 645 (N.D. 1994)

State v. Murphy 516 N.W. 2d 285

State v. Allery 371 N.W. 2d 133

State v. Salhus 220 N.W. 2d 852

### Statues, Rules, or Other Authorities:.

Section 39-20-03 of the North Dakota Century Codes

City of Minot v. Kary  
Supreme Court Nos. 20030343, 20030344

Appellant's Reply Brief

It should be stressed that Section 39-20-03 of the North Dakota Century Code provides, "any person who is dead, unconscious, or otherwise in a condition rendering him incapable of refusal, must be deemed not to have withdrawn the consent provided by section 39-20-01 and the test or test may be given." We believe that Kary was not in the proper state of mind to refuse the test. The Hearing Officer in his conclusion of law concluded that "There is insufficient evidence to show that Kary was capable of withdrawing his consent to a test. His negative responses to the officer's requests suggest otherwise, but the circumstances, the accident, his injuries, his unresponsiveness to the officers' inquiries at the scene and his confused speech at the hospital, conversely suggest that he lacked the presence of mind to make and articulate a decision" (SFN 9342 (Rev 8-99)). Officer Saltsman noted that such an incapability of refusing was the observation of Dr. Jeff Sather. However, Saltsman testified that Kary did not give his consent. We believe Saltsman erred when describing Kary as having refused the test when seen in the light of the Century Code and the opinion of the board certified physician. The prosecutor on page 114 announced that "Mr. Kary did refuse, that's why we have no test." From page 122 he announces that "he was not otherwise capable of refusing to give a test, he did refuse." The prosecutor also noted that the defendant's response was an "emphatic no" when asked to submit to the blood alcohol test (page 122 of transcript). *State v. Beaton*, 516 N.W.2d 645 (N.D. 1994) has held that "our conclusion that Beaton's words of refusal should have been excluded from evidence." We agree that the prosecutor's

language for the supposed refusal should not have been part of the evidence, and the prosecution's mention of any response would have given the jury the inference of a manifested consciousness of guilt. *State v. Murphy* 516 N.W. 2d 285 holds that "an ordinary reading of the statute suggests evidence of refusal to take a test is relevant to some element of the crime of driving while intoxicated." Therefore, the introduction of the supposed refusal had a material impact on the verdict, and the objection was noted on page 111 of the transcript.

There are also inaccuracies in the Appellee's statement of facts. The appellee indicated that at the time Officer Dump attempted to talk to Kary, he noticed a strong odor of alcohol. It should be noted from page 42 of the transcript that at the time Dump could not detect any odors. In fact, Dump noted that "all's I could smell was the odors from the vehicle."

We are also at odds with the Appellee's statement of fact that Dump had requested Officer Saltsman to check the defendant for a possible DUI charge. Page 44 of the transcript indicates that Dump did not believe he had requested Saltsman to issue a summons as he believed Saltsman "observed things on his own as well."

The next contention of the statement of facts deals with the defendant being "awake and alert and answering questions put to him by the hospital staff." Such an observation was not borne out in the testimony, and its source cannot be determined, especially given the fact that the attending physician indicated that he was not in the proper state of mind to give consent.

It should also be noted that as soon as Dump turned on his sirens that Kary braked and immediately "began to slide." It is questionable that such a curve is slight given

— Dump's testimony of previous accidents on this particular curve (page 50 of the transcript). It seems only natural to assume that a car sliding is the result of a roadway not being clear. We believe that such omissions and additions in the appellee's "statement of facts" do not serve the interest of accuracy.

We are also at odds with the Appellee's description in his brief that both officers testified that "the weather was clear and the roadway was clear and dry" (page 5 of the Appellee's brief). No where in his testimony or other supporting documents does Saltsman testify about the weather and road conditions. Also, Officer Dump testified that the best way to put it (the weather) was not "extreme" (Page 49 of the transcript). However, we have attached weather reports that indicate otherwise.

— When the defense counsel moved to dismiss the case for lack of evidence, the prosecutor responded that "we do have the clear weather conditions, the clear street conditions" (page 102 of the transcript). The clear weather conditions that are mentioned are purely fictitious and unsubstantiated by fact. Weather documents show that the weather was not clear as snow, fog and haze were all present on March 16<sup>th</sup>, 2002 (See the Local Climatological Data). The insurance agent's report also indicated that the cause of the accident was due to road conditions. The weather was also below freezing at the time of the accident. The pictures that were presented in trial would fail to indicate either the presence or the absence of icy road conditions or "black ice." Therefore, the prosecution has failed to prove clear weather conditions, and evidence attached show that the weather conditions were indeed icy and far from ideal as the prosecution incorrectly assumed and failed to prove.

— The following are the reasons the Appellee outlined why Kary was arrested for

driving while intoxicated:

- 1) The speed of the accident
- 2) The odor of alcohol
- 3) The good weather and road conditions
- 4) The severity of the crash.

Therefore, when the objection to dismiss was not granted, and when the prosecutor said that they had more evidence, what they actually thought they had were the “good” weather and road conditions and the severity of the crash. We are uncertain as to how the severity of the crash serves as evidence, but we are certain as to the weather and road conditions that have been noted.

It has been noted in *State v. Salhus* 220 N.W. 2d 852 that the “aftereffect of alcohol on the defendant’s breath” is “insufficient to sustain conviction.” The State in *State v. Allery* 371 N.W. 2d 133, noted that with evidence reminiscent of that provided by the prosecution, i.e. the odor of alcohol, an accident, and the defendant’s sustained injuries, that “further prosecution without the suppressed evidence would be futile.” Since conditions were icy and since speeding is not a symptom of intoxication there does not exist the required evidence to convict (no alcohol containers, no swerving, no tests, etc). Furthermore, there was no compliance with the Century Code for the blood alcohol test.

#### Conclusion:

Therefore, we believe that the State failed to prove the elements of the case as a matter of law and along its way did much harm to the name of justice and the rights of the defendant. On the basis of the above the Appellant respectfully requests the North Dakota Supreme Court to reverse the defendant’s verdicts of guilty.

Dated this 7<sup>th</sup> day of June, 2004.

Trenton Kary  
1308 N.E. 6<sup>th</sup> ST  
Minot, ND 58703

# HEARING OFFICER'S DECISION

North Dakota Department of Transportation, Legal Division  
SFN 9342 (REV 8-99)

2F

Name of Petitioner KARY, TRENTON JACOB		When hearing held 04/09/2002 2:45	Operator's License Number 501-13-0511
Address of Petitioner 1308 6 STREET NE, MINOT, ND 58703		Attorney THomas Schoppert	County of Occurrence WARD
Date of Birth 12/07/1981	Date of Occurrence 03/16/2002	Date of Temporary Operator's Permit 03/17/2002	Issuing Agency MINOT PD

## FINDINGS OF FACT

On March 16, 2002, at 4:23 AM, the petitioner, Mr. Kary, was driving westbound on a public roadway in Minot at a speed of at least 68 mph in a 30 mph zone. He failed to negotiate a curve and crashed through a guardrail and a fence before striking a tree some distance off the roadway. The vehicle sustained extensive damage, to include a significantly damaged steering wheel and a windshield that had been broken out from an interior impact. Kary was wedged between the dashboard, the seat and the right door. Kary did not respond to the investigating officer's inquiries about his identity and condition. He simply made a statement that he "was done." Kary's face was bleeding, apparently an injury that resulted from the accident. He had the odor of an alcoholic beverage on his breath. He was taken to a hospital by ambulance and treated in the emergency room, where his speech was described by medical personnel as confused. A police officer advised Kary of the implied consent law and asked Kary twice if he would provide a blood sample for chemical testing. On both occasions Kary responded "No." There was no other conversation between Kary and the officer. The officer did not determine from the medical staff whether Kary's condition was such that he could understand the blood sample request or any other communications. The officer made no attempt to collect a blood sample from Kary.

## CONCLUSIONS OF LAW

Section 39-20-03 of the North Dakota Century Code provides, "any person who is dead, unconscious, or otherwise in a condition rendering him incapable of refusal, must be deemed not to have withdrawn the consent provided by section 39-20-01 and the test or tests may be given." Although Kary was not dead or conscious, there is insufficient evidence to show he was capable of withdrawing consent to a test. His negative responses to the officer's requests suggest otherwise, but the circumstances, the accident, his injuries, his unresponsiveness to the officers' inquiries at the scene and his confused speech at the hospital, conversely suggest that he lacked the presence of mind to make and articulate a decision. The officer received no medical opinion to the contrary prior to requesting the blood sample, and the officer made no attempt to collect the a sample over Kary's ostensible objections. The evidence is insufficient to establish by a preponderance that Kary was capable of withdrawing his consent.

DECISION: DISMISS

NOTICE: If this decision is to suspend or revoke, it constitutes the official notice of the action against your driving privileges by the NDDOT director as of this date.

Dated: April 09, 2002

TEMPORARY PERMIT:

This entire document is valid as a temporary operator's permit for 20 days from the date of issuance

Dated: April 09, 2002

I have been informed of the results of the hearing conducted today. I acknowledge receipt of a copy of the hearing officer's decision. I know that the temporary operator's permit issued to me in the Report & Notice form is now invalid.

Dated: April 09, 2002

Signature of Petitioner



**UNEDITED LOCAL CLIMATOLOGICAL DATA**

NOAA, National Climatic Data Center

Month: 03/2002

Station Location: MINOT INTERNA

MINOT, ND

Lat. 48°16'N Lon. 101°17'W

Elevation(Ground): 1665 ft. above sea l

Temperature (Fahrenheit)										Degree Days Base 65 Degrees		Significant Weather	Snow/Ice on Ground(In)		Precipitation (In)		Pressure(inches of Hg)		Wind : Dir=ter		
Date	Max.	Min.	Avg.	Dep From Normal	Avg. Dew pt.	Avg Wet Bulb	Heating	Cooling	0600 LST	1200 LST	2400 LST		2400 LST	Avg. Station	Avg. Sea level	Result Speed					
1	14	-9	0	-19	-13	0	62	0													
2	14	-6	0	-18	-11	1	61	0				0.00	28.48	30.45	9.3						
3	28	-8	10	-13	-4	5	55	0	FG HZ			0.00	28.51	30.47	12.0						
4	29	15	22	-1	14	20	43	0	SN FG			T	28.28	30.23	10.5						
5	18	-1	0	-14	6	10	56	0	SN FG FZFG HZ			T	28.07	29.96	11.7						
6	6	-7	0	-24	-9	0	65	0	SN FG			T	28.25	30.17	8.8						
7	7	-8	0	-24	-2	2	65	0	SN FG FZFG HZ			T	28.48	30.44	7.4						
8	7	-4	0	-23	-1	2	63	0	SN FG FZFG HZ			0.03	28.31	30.25	9.6						
9	4	-9	-2	-27	-10	-4	67	0	HZ			0.02	28.30	30.23	9.5						
10	11	-15	-2*	-27	-9	-3	67	0	HZ			T	28.49	30.45	17.5						
11	18	-5	0	-19	2	7	58	0				T	28.44	30.41	6.5						
12	46	18	32	6	24	30	33	0				0.00	28.10	30.02	0.7						
13	28	12	20	-7	12	17	45	0				T	27.78	30.96	16.1						
14	28	15	22	-5	15	19	43	0	HZ			0.00	28.14	30.02	2.5						
15	39	20	30	3	22	27	35	0	FG			0.00	28.21	30.12	2.8						
16	36	20	28	0	22	26	37	0	SN FG HZ			T	28.21	30.08	3.6						
17	35	19	27	-1	25	27	38	0	SN FG HZ			T	28.26	30.14	7.9						
18	21	9	15	-14	10	14	50	0	SN FG HZ			0.03	28.16	30.03	1.7						
19	16	5	11	-18	6	9	54	0	SN FG FZFG HZ			T	28.38	30.31	8.2						
20	10	-3	0	-26	-1	5	61	0	SN FG FZFG HZ BLSN			0.01	28.47	30.39	7.6						
21	12	-5	0	-26	-6	2	61	0	HZ			T	28.63	30.58	11.3						
22	24	3	14	-16	-2	9	51	0				0.00	28.81	30.77	21.6						
23	29	7	18	-13	8	15	47	0				0.00	28.37	30.30	16.1						
24	20	7	14	-17	5	12	51	0				0.00	28.24	30.15	3.9						
25	27	0	14	-18	5	12	51	0				0.00	28.54	30.46	8.7						
26	36	9	23	-9	15	21	42	0				0.00	28.53	30.47	8.7						
27	51*	30	41*	8	29	35	24	0				0.00	28.22	30.11	8.6						
28	48	32	40	7	26	33	25	0				T	27.76	30.09	11.5						
29	43	30	37	3	25	31	28	0	SN FG+ FG UP			T	27.74	29.59	16.6						
30	34	25	30	-4	17	26	35	0				0.01	27.94	29.78	19.6						
31	37	19	28	-7	13	23	37	0	SN FG			T	28.09	29.95	23.0						
25.0 6.9 16.0 ----- 7.5 14.0 48.7 .0										<Monthly Averages		Totals>		0.12	28.27	30.24	5.9				
-10.5 - - - - - 11.0 10.0										----- Departure From Normal ----->				-50							
Degree Days Monthly Season to Date										Greatest 24-hr Precipitation: 0.03 Date: 17										Sea Le	
Total Departure Total Departure										Greatest 24-hr Snowfall: Date:										Maxim	
										Greatest Snow Depth: 0 Date:										Minir	
Heating: 1513 329 7287 -748										Number of Days with -----> Max Temp >=90: 0 Max Temp <=32: 21 Thunderstorms : 0										Min Te	
Cooling: 0 0 0 0																				Min Te Heavy	
* EXTREME FOR THE MONTH - LAST OCCURRENCE IF MORE THAN ONE.																					

**AFFIDAVIT OF MAILING**

I am over the age of 18 years, and, on June 8th, 2004, I mailed the Appellant's Reply, a copy of which is attached, to the addressee set forth below, by depositing a copy enclosed in a postpaid wrapper, in an official depository under the exclusive care and custody of the United States Postal Service, in Minot, ND Ward County

20030343  
20030344

addressed as follows:

State's Attorney; 315 3rd St SE; P.O. Box 5005; Minot, ND 58702

Adm. Reply 06/08/2004  
Signature Dated

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

JUN 08 2004

Subscribed and sworn before me this 8 day of June, 2004.

STATE OF NORTH DAKOTA

Notary Public:

Harold Rippling

My Commission Expires: 9-3-04

**AFFIDAVIT OF MAILING**

I am over the age of 16 years, and, on 06/08/2004, I mailed the Appellant's Reply, a copy of which is attached, to the addressee set forth below, by depositing a copy enclosed in a postpaid wrapper, in an official depository under the exclusive care and custody of the United States Postal Service, in

Minot, ND, Ward

20030344

addressed as follows:

Supreme Court; 600 E. Boulevard Ave Dept. 180; Bismarck ND 58505

gh  
Signature

06/08/2004  
Dated

Subscribed and sworn before me this 8 day of June, 2004.

Notary Public:

Hart Apple

My Commission Expires:

9-3-04

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

JUN 08 2004

STATE OF NORTH DAKOTA